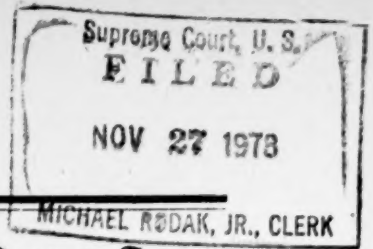


No. 78-403



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**In the Supreme Court of the United States**

**OCTOBER TERM, 1978**

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**WILLIAM J. SCOTT,  
ATTORNEY GENERAL OF ILLINOIS, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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***ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SEVENTH CIRCUIT***

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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**WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530***

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Petitioner seeks review of the decision below enforcing federal grand jury subpoenas requiring certain employees of the State of Illinois to produce designated state records.<sup>1</sup>

The pertinent facts are as follows: Petitioner is the Attorney General of the State of Illinois. A federal grand jury in the Northern District of Illinois is investigating the petitioner for possible criminal violations of the Internal Revenue Code (Tr. 16, 39-40, 45).<sup>2</sup> The grand jury issued

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<sup>1</sup>The subpoenas also called for the production of certain of petitioner's personal campaign financing records which might have been in the possession of the subpoenaed state employees. However, petitioner has abandoned any challenge to the production of campaign financing records (Pet. 9, 15). Thus, only the production of official records of the State of Illinois is at issue.

<sup>2</sup>"Tr." refers to the transcript of the March 22, 1978, hearing before the district court.

subpoenas *duces tecum* to five employees of the State of Illinois, ordering them to produce official state records and some of petitioner's personal campaign financing records in their possession. The records sought by the grand jury are pertinent to petitioner's federal income tax liability during the period of his service as Illinois Attorney General. The district court rejected petitioner's motion to quash or modify the subpoenas. Although the court added clarifying language to the subpoenas to ensure they did not encompass the production of the minutes of official meetings of the State Attorney General or official telephone conversations (Pet. App. A17, A19-A20), it concluded that " \* \* \* there is nothing in the state sovereignty concept that would prevent the subpoenas from being served and enforced" (Pet. App. A17). After reviewing the affidavits and the grand jury materials *in camera*, the district court was " \* \* \* satisfied that the subpoenas as to their substance are all reasonable—they are reasonable searches and seizures—that there is a rational relationship or nexus between what they seek and the business of the grand jury" (*ibid.*).

Petitioner's application for a stay pending appeal was denied by the district court, the court of appeals, and this Court (Pet. App. A2). Prior to the oral argument in the court of appeals, the state employees produced originals or copies of all of the documents requested by the subpoenas. The court of appeals affirmed (Pet. App. A1-A9). After examining the affidavits and grand jury documents *in camera*, the court held that the subpoenas sought information that was relevant and material to the grand jury's criminal investigation (Pet. App. A9).<sup>3</sup>

<sup>3</sup>Contrary to the court of appeals' conclusion (Pet. App. A2-A3), the case became moot once the state employees complied with the subpoenas. See, e.g., *United States v. Hankins*, 565 F. 2d 1344, 1350

Petitioner argues (Pet. 8-9) that the principles of comity and federalism, as expressed in the Tenth Amendment, immunize the public records of the State of Illinois from production to a federal grand jury. But the concept of federalism " \* \* \* does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Federalism recognizes "the legitimate interests of both State and National Governments \* \* \* " (*ibid.*). The court of appeals correctly ruled that petitioner had failed to establish an important state interest that would justify impeding the federal criminal investigation. Accord: *Matter of Grand Jury Impaneled January 21, 1975*, 541 F. 2d 373, 377-378 (3d Cir. 1976).

A federal grand jury " 'has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972), citing *United States v. Bryan*, 339 U.S. 323, 331 (1950). Petitioner concedes (Pet. 15) that no privilege or right of confidentiality has been infringed by the production of the documents sought by the subpoenas. However, he argues (Pet. 10-11) that the subpoenas were "needless" and have interfered with the State's desire to "safeguard, regulate and afford speedy access to its official records" (Pet. 10). In petitioner's view, the grand jury should have sought to obtain access to the State's records under the Illinois State Records Act, which permits the public inspection of records of the obligation, receipt and use of state funds. Ill. Rev. Stat. ch. 116, §43.6 (1978 Supp.).

(5th Cir. 1978), clarified on other grounds and rehearing denied, 581 F. 2d 431 (5th Cir. 1978); *Kurshan v. Riley*, 484 F. 2d 952 (4th Cir. 1973); *United States v. Lyons*, 442 F. 2d 1144, 1145 (1st Cir. 1971); *Baldridge v. United States*, 406 F. 2d 526, 527 (5th Cir. 1969).

But as the court of appeals correctly noted, any administrative inconvenience to the State of Illinois from the enforcement of the subpoenas would be minimal because the United States Attorney had agreed to make the originals of needed documents available to the State (Pet. App. A6). Moreover, petitioner "made no showing whatsoever \* \* \* that the absent subpoenaed documents would have a deleterious effect on the functioning of any state office" (Pet. App. A7).<sup>4</sup>

Petitioner further contends (Pet.12-13) that the subpoenas were "unnecessary" because the grand jury's need for evidence could adequately be fulfilled under the State Public Records Act. But the court of appeals correctly observed (Pet. App. A7-A8) that the Illinois State Records Act generally provides for public inspection of most of the documents sought by the grand jury only at the discretion of the State Attorney General (Ill. Rev. Stat. ch. 116, §43.6) and does not contain any enforcement mechanism to insure compliance. The federal government was therefore amply justified in seeking the documents by means of grand jury subpoenas.

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<sup>4</sup>Petitioner also contends (Pet. 12) that the subpoenas confronted the state employees with the "Hobson's choice" of violating state law by producing the records or disobeying the order of the district court. But even on the assumption that the State would prosecute its employees for removing state records, an individual could not be prosecuted for complying, in good faith, with an order of a federal court. *In re New York State Sales Tax Records*, 382 F. Supp. 1205, 1206 (W.D. N.Y. 1974). The district court therefore correctly concluded that the interests of the witnesses were best served by subpoenas rather than by voluntary disclosures (see Pet. App. A18).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.  
*Solicitor General*

NOVEMBER 1978